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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

MANUEL LUJAN, JR., Secretary of the Interior, et al.,
Petitioners,
vs.
NATIONAL WILDLIFE FEDERATION, et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS URGING AFFIRMANCE

State of California, John K. Van De Kamp, Attorney General of California and the States of Florida, North Carolina, Ohio, Vermont and Wyoming

JOHN K. VAN DE KAMP, Attorney
General of the State of California
ANDREA SHERIDAN ORDIN
Chief Assistant Attorney General
*THEODORA P. BERGER
Assistant Attorney General
CRAIG C. THOMPSON
SUSAN L. DURBIN
CLIFFORD L. RECHTSCHAFFEN
NILDA M. MESA
Deputy Attorneys General
3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-7830

*Counsel of Record (CONTINUED ON INSIDE COVER)

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600

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LISTING OF STATE ATTORNEYS GENERAL OTHER THAN CALIFORNIA

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

LACY H. THORNBURG
Attorney General
State of North Carolina

ANTHONY J. CELEBREZZE, JR.
Attorney General
State of Ohio

JEFFREY L. AMESTOY
Attorney General
State of Vermont

JOSEPH B. MEYER
Attorney General
State of Wyoming

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QUESTIONS PRESENTED

1. Whether federal agencies may escape compliance with the National Environmental Policy Act ("NEPA") and the Federal Land Policy Management Act ("FLPMA") by requiring parties seeking to challenge federal agency noncompliance with those acts to prove standing to challenge each individual decision made under a national program?

2. Whether complex actions by federal agencies are exempt from judicial review by virtue of their breadth?

3. Whether the mere opening of an agency's files to public inspection constitutes compliance with the National Environmental Policy Act?

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INTEREST OF AMICI

The States filing as amici have a vital interest in preserving their ability to participate in the National Environmental Policy Act (42 U.S.C. §4321 *et seq.*; "NEPA") process and the Federal Land Policy and Management Act (43 U.S.C. 1701 *et seq.*; "FLPMA") process. The Bureau of Land Management ("BLM") misconstrues the affidavits of the respondent to hide its true goal: to insulate its actions from judicial review.

BLM seeks nothing less than to overturn decades of development of the standing doctrine to thwart judicial challenges of its Congressionally-mandated duty to comply with NEPA and FLPMA. Such a result would be unfortunate, because, as this Court stated last year, "NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." 1/

NEPA has special importance for the States because federal actions, both on and off federal lands, significantly affect state resources. The effects are especially felt in western States, where much of the land and natural resources are federally-owned and managed.[2/] In recognition of these special state interests, Congress specifically provided, in Section 102 of NEPA, that States and local governments be included in the federal environmental analysis process.[3/]

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1. *Robertson v. Methow Valley*, 109 S.Ct. 1835, 1845 (1989).

2. BLM manages 17,204,689 acres of public land in California alone. Bureau of Land Management -- California: Annual Report Fiscal Year 1989 at 41.

3. The legislative history of NEPA is also full of references to the need to involve state and local governments in the environmental planning and decisionmaking process. H. Rep. No. 378, 91st Cong., 1st sess. 3-4; H. R. Conf. Rep. No. 765, 91st Cong., 1st sess. 8-9; reprinted in 1969 U.S. Code Cong. & Admin. News 2751, 2753-54, 2769. NEPA's implementing regulations specifically require that draft environmental impact statements be circulated to appropriate state agencies. 40 CFR §1503.1 (1987).

The NEPA process is the critical avenue through which States may examine and assert their interests in federal decisions. The implementation of FLPMA is another important means for States to participate in this process. The economic and environmental burdens of mitigating the consequences of federal actions increasingly fall on state and local governments. NEPA's environmental impact research, review and disclosure procedure is essential to the States' abilities to plan for and help ameliorate the consequences of federal actions.

The ability to bring suit under NEPA and FLPMA is of special concern to the States because of this fiscal and environmental impact on state resources. The States often rely on federal statutes such as NEPA and FLPMA to challenge decisions by federal agencies such as BLM. If BLM is permitted to shield its decisions from judicial review by misconstruing the procedural requirements of these statutes, it would unjustifiably restrict the ability of States in the future to seek redress

through the federal judiciary for the "overreaching" of federal agencies.[4]

The States are particularly interested in the outcome of this action because of the potential for abuse shown by BLM of basic NEPA and FLPMA law. In *National Wildlife Federation v. Burford, et al.*, 878 F.2d 422 (D.C. Cir. 1989), *cert. granted*, No. 89-640, (January 16, 1990), BLM embarked upon a coordinated program to remove federal protections from public lands to open these lands to mining and mineral leasing and oil and gas exploration. Although many of these lands have value as recreational and wilderness areas, and although the program was national in scope, BLM failed to conduct a programmatic environmental impact statement ("EIS"), to develop land use plans, and to notify Congress before deciding to proceed with terminating the federal protections nationwide. No notice was given of this nationwide program, no hearings were held, and no comments were solicited. Instead, its full impact was hidden behind a screen of individual decisions, diverting attention from the impact of the national program.

Amici urge this Court to reject the federal petitioner's revision of established standing doctrine under

4. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 567, (1985) (Powell, dissenting.)

NEPA and FLPMA, and to support the opportunities to participate in federal agency environmental analyses, so as to ensure that federal agencies do indeed take a "hard look" at the consequences of their programs on the States in which they will be carried out.

STATEMENT OF THE CASE

Amici adopt respondent's statement of the case.

SUMMARY OF ARGUMENT

1. A federal agency cannot shield its decisions from judicial review by characterizing a single national program as a series of isolated decisions. BLM's actions in this case stem from one central policy decision, and the challenging party should not have to produce members injured by each of the program's implementations to prove standing.

2. No separation of powers principles are violated by judicial enforcement of NEPA and FLPMA. A federal agency may not escape judicial review merely because a program is large in scope and affects many acres of land. BLM is seeking to strip federal courts of their traditional role of ensuring that federal agencies comply with their Congressionally-mandated duties.

3. The injury caused by a federal agency's failure to comply with the procedural requirements of NEPA and FLMPA is the loss of the opportunity to participate in the federal decision-making process. This harm is not the equivalent of informational injury under the Freedom of Information Act, and cannot be remedied simply by an agency opening up its program files after a decision has been made.

ARGUMENT

I

FEDERAL AGENCIES MAY NOT ESCAPE THE PROCEDURAL REQUIREMENTS OF NEPA OR FLPMA BY REQUIRING THAT PARTIES PROVE STANDING TO CHALLENGE EACH INDIVIDUAL DECISION MADE UNDER A NATIONAL PROGRAM IN ORDER TO CHALLENGE AGENCY COMPLIANCE

The federal agency petitioner's brief is nothing more than a thinly veiled attempt to evade judicial review of its failure to act under NEPA and FLPMA by altering the traditional rules of standing under environmental statutes. Its deconstruction of the respondent's affidavits can not hide its ultimate aim of precluding those with standing from insisting that key NEPA and FLPMA procedures are followed.

A. BLM seeks to portray a national program as a series of separate, unconnected decisions.

This federal agency's characterization of a truly national program as a set of unconnected local decisions is of great concern to the States. Of greater concern is the implication that a party must establish

standing to challenge such a program by proving its standing to sue on each individual implementation of the program. Such a drastic revision of standing requirements could seriously hamper the ability of both individuals and States to stop legal violations by federal agencies.

To thwart the application of established standing rules, and thus to insulate its actions under NEPA and FLPMA from legal challenge, the federal agency petitioner disingenuously characterizes its national program as "a vast array" of individual decisions. Fed.Br.(i). Despite petitioner's lengthy narrative of the history of federal land use policy, the actions at issue in this case were not unrelated, individual decisions but arose from a deliberate program.

The record in the proceedings below is full of references by BLM to its withdrawal revocations and classification terminations as a program. See, e.g., Department of the Interior, BLM Withdrawal Review Program: A Report of Progress to the National Public Lands Advisory Council, (1985) J.A. 51-54; and Edwards Affidavit 1B, Def.Exh. 21, manual providing guidance for implementation of the Withdrawal Review **Program**, including **Program** Direction, Completion Schedule, **Program** Priorities, Progress Reporting, and Quality Control. (Emphasis added.) See also Pl. Exh. 1, 2, 3, 11, 17, 20, 70, as well as Edwards Affidavit 1C, Def. Exh. 8, all of which are instances where the government refers to withdrawal revocations and

classification terminations as a single coordinated program.

The District Court specifically found that these actions constituted a program. That court, even on remand, defined the proposal as a "**program** concern[ing] the termination of land classifications and the revocation of land withdrawals." Fed. Pet. App. 30a, n. 6. (emphasis added.) If petitioner's position were to be accepted, any national program, no matter how ambitious, could be characterized as a series of individual decisions, in order to frustrate judicial review of an agency's actions.

B. NWF need not establish standing to challenge the BLM program by producing members injured by each of the program's implementations

As this Court has written so often in the past, the requirement of standing arises out of Article III's mandate that federal courts only resolve actual "cases" or "controversies." U.S. Const. Art. III, §2. The standing inquiry "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1967). Where standing can not be shown, Article III principles dictate that a court is without

jurisdiction. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982).

In order to invoke the powers of the federal judiciary, certain *de minimis* standards must be met. Most important, and at issue in this case, is that parties must allege they suffer a "distinct and palpable" injury ("injury in fact"), either in the present or in the future, because of the putatively illegal acts of the defendant. *Valley Forge*. The injury must be real, not speculative, though "an identifiable trifle" will do. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 678, 689 (1973). The injury must also be caused by the defendant's putatively illegal acts or threatened acts. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). In addition, the injury must be capable of remedy by the court. *Warth v. Seldin*, 422 U.S. 490 (1975).[5/]

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5. This Court normally finds standing where a plaintiff also meets its "prudential" requirements, relating to whether the injury was within the "zone of interests" meant to be protected by a statute, *Clarke v. Securities Industry Association*, 479 U.S. 388 (1986), is more than a "generalized grievance" shared by many other persons, *Warth, supra*, and whether the plaintiff asserts his own interests rather than those of a third party, *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

Where, as here, standing is claimed as an "aggrieved" or "affected" person under §10 of the Administrative Procedure Act ("APA"), 5 U.S.C. 702, this Court has required that plaintiffs meet its constitutional and prudential requirements. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

Harm to aesthetic and environmental interests, such as is described in the affidavits submitted by plaintiffs below, was long ago recognized as a legitimate basis for alleging sufficient injury to meet the APA and Article III requirements. *See, Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978); *SCRAP; Sierra Club v. Morton*, 405 U.S. 727 (1972); *Association of Data Processing Service Organizations*. Such harm, even if it is shared by many other people, is evidence of injury in fact so long as the party demonstrates the necessary personal stake in the case. *Public Citizen v. United States Department of Justice*, 109 S.Ct. 2558 (1989).

Though standing is sometimes more easily shown by bringing forth several affected parties, this Court has never required a challenge to a federal agency action to be brought by a certain minimum number of persons or entities.[6/] Nor has this Court required an

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6. C.f. *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), where the Court expressed no concerns about the standing of environmental groups to challenge the failure to prepare a programmatic EIS

organization to submit a declaration from every one of its members to show standing, or to produce multitudes of persons affected by a program. *Warth, supra*. In fact, this Court recently praised the advantages of suits brought by organizations because their organizational purposes lend "expertise" and "concrete adverseness" to disputes. *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, et al., v. Brock,* 477 U.S. 274, 289 (1986).

Traditionally, so long as injury is established by one member of an organization, that organization has shown standing to bring suit in federal court. *See also Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977).

Moreover, despite the petitioner's fervent assertions to the contrary, it is not at all unreasonable for a party, be it a Chamber of Commerce, an individual, or a state, to be able to bring suit against a federal agency based on the injury suffered from one application of a federal statute or program. That has long been the rule. *See, e.g., International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, et al., v. Brock; Kleppe v. New Mexico,* 426 U.S. 529 (1976); *Duke Power Co. v. Carolina Environmental Study Group, Inc.;* C.f., *Austin, et al. v. Michigan State*

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for the development of coal reserves in the Northern Great Plains Region.

Chamber of Commerce, No. 88-1569 (March 29, 1990); *Hunt v. Washington State Apple Advertising Commission.*[7]

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7. Petitioner misapplies the standards for judging a nonmoving party's evidence in a motion for summary judgment. NWF's evidence of standing, while perhaps not a model of specificity, was "clearly averred" and clearly appears in the record. *FW/PBS, Inc. v. City of Dallas*, 110 S.Ct. 596 (1990). Comparing the affidavits to others previously approved, the two affidavits originally submitted by NWF in fact strikingly resemble language approved by this Court in other standing cases. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, at 73 ("in the vicinity of"); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 112 (1979)(on motion for summary judgment, plaintiff's complaints alleging harm to "society" construed to mean "neighborhood"); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, at 678, (plaintiffs alleged they used the "forests, rivers, streams, mountains and other natural resources surrounding the Washington metropolitan area"). The remaining affidavits are at least, if not more, specific. In any case, as this Court has pointed out in the past, the appropriate remedy to remove doubt would be to remand for supplementation of the record, not to dismiss. *SCRAP, supra*. C.f., *Celotex v. Catrett*, 477 U.S. 317 (1986)

The argument also confuses an absence of evidence with a dispute of fact. NWF, as a nonmoving party, did not have to prove an element

The actions being challenged in this case stem from a single, central policy decision of the BLM to lift protective land classifications. The fact that this decision has been implemented nationwide cannot deprive injured parties of standing to contest its legal validity.

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of its case at the summary judgment stage. Rather, the petitioner, as the moving party, was required to "show the absence of any disputed material fact." *Adickes v. Kress*, 398 U.S. 144, 158-159 (1970). Looking at the record to establish "the necessary factual predicate [instead of] glean[ing] them from the briefs and arguments," *FW/PBS, Inc. v. City of Dallas*, 107 L.Ed.2d 603, 624 (1990), federal petitioner's evidence indicates that the area at issue is much more compact than the petitioner would have the Court believe. Department of the Interior, Draft Lander Resource Management Plan/EIS (1986).

II

BLM IS SEEKING TO AVOID JUDICIAL REVIEW OF ITS COMPLIANCE WITH FEDERAL STATUTES BECAUSE ITS PROGRAM IS NATIONAL IN SCOPE

A. BLM is attempting to insulate from review its compliance with NEPA and FLPMA on the grounds that its program affects many acres of land.

This Court should soundly reject the implied argument of this federal agency that a court should not enforce NEPA or FLPMA procedures if the federal agency's program affects many acres of land. Merely because a program is national should not be a basis for allowing a federal agency to evade its NEPA obligations, since "NEPA contains no exemptions for projects of national scope." *State of California v. Block*, 690 F.2d 753, 765 (9th Cir. 1982). In fact, the very national scope of a project makes the performance of an EIS more important, rather than less. The rule proposed by BLM would be a disaster for the states, gutting NEPA as well as FLPMA protections on precisely those federal programs with the potential for the widest possible economic and environmental consequences.

NEPA compels a federal agency to conduct an EIS whenever it proposes a "major Federal action[]

significantly affecting the quality of the human environment." 42 U.S.C. §4332. The importance of NEPA's action-forcing provision is twofold: it ensures that the agency will have sufficient information about every significant environmental impact of a proposed action, and it guarantees that the agency will inform the public that it has considered environmental concerns in its decisionmaking process. *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983). In addition, the EIS process offers states and other government bodies "adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner." [8/]

An important component of the NEPA process is the "tiering" procedure set forth in the regulations implementing NEPA adopted by the Council on Environmental Quality (CEQ), *see* 40 CFR 1502.20; 1508.28 (1989).[9/] Tiering is designed to allow federal agencies to examine the environmental impacts of an large-scale program or plan (such as national program or policy statements) in broader impact statements,

8. *Robertson v. Methow Valley Citizens Council*, 109 S.Ct. at 1846.

9. The regulations adopted by CEQ implementing NEPA are binding upon all federal agencies. 40 C.F.R. §§ 1500.3, 1507.1; *see also Andrus v. Sierra Club*, 422 U.S. 347, 358 (1979).

while focusing on the impacts of individual actions in subsequent, site-specific EISs. *See id.*

Agencies must comply with NEPA's statutory directives to the "fullest extent possible." [10/] This Court has explained that the language chosen by Congress "is neither accidental nor hyperbolic. Rather, [Congress] deliberate[ly] command[s] that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle." [11/]

B. Judicial enforcement of the requirements of NEPA and FLPMA does not violate separation of powers principles.

Petitioner argues in its brief that this case raises serious issues of separation of powers (Petitioner's brief at pages 36-37). This argument is a sham, based on a mischaracterization of the doctrine of separation of powers. This is not a case in which the courts are being asked to trespass upon the responsibilities of another branch of government, but a case in which they are being asked to carry out a function that is squarely and clearly assigned to the courts: assuring that federal

10. *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787 (1976).

11. *Id.*

agencies obey the laws Congress has passed and carry out the duties Congress has assigned to them.

True separation of powers issues arise when the Court is asked to decide a political question, see *Baker v. Carr* 369 U. S. 186 (1962), or to make unauthorized forays into foreign relations that are committed solely to the other branches of government, *see* discussion in "The War Powers Doctrine and the Political Question Doctrine," 1977, 49 U.Colo.L.Rev. 65. But here, the petitioner has made no such allegation, and cannot do so, for no such issue or question is involved. Rather, what the petitioner asserts is that this case is nonjusticiable because it is large, difficult, complicated, and involves the administration of large amounts of land. Indeed, petitioner seems to argue that it is the size and complexity of the case that implicates the separation of powers doctrine; the number of acres involved, the volume of the record the district court must review, and the "overwhelming" size of the case that make the case somehow inappropriate for judicial resolution.

This has never been the rule enunciated by this Court. It simply cannot be the case that as the country grows and the responsibilities imposed on the government grow more complex, and the more people its actions affect, the courts lose jurisdiction to review the legality of the government's most important actions. In fulfilling their responsibility to resolve allegations that federal agencies are violating congressional

mandates, as well as in other spheres such as antitrust cases, courts handle huge records and complex and difficult cases every day. Cases involving highly technical issues of engineering, chemistry, statistics, and science are presented regularly to the courts under the Clean Air Act and Clean Water Act, as well as such statutes as the Comprehensive Environmental Response, Cleanup, and Liability Act (commonly called the "Superfund" law), and the courts are able to handle them.[12/] Similarly, the courts can and have performed admirably in the very case at bar in ensuring that the BLM has properly administered lands subject to the final decision in this case. The petitioner asks this Court to believe that the courts cannot do what they have successfully done in this case and others for years, and as a result to insulate the largest governmental decisions from review.

It is particularly disingenous for petitioner to invoke the spectre of separation of powers questions here because, as the District Court found early on, this case raises essentially legal issues.[13/] BLM's portrayal of

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12. Clean Water Act, 33 U.S.C. §1251 *et seq.*; Clean Air Act, 42 U.S. §7401 *et seq.*; Comprehensive Environmental Response, Cleanup, and Liability Act, 42 U.S.C. §9601 *et seq.*

13. The lower court said: "The essence of plaintiffs' claim is legal: The exercise of agency discretion and expertise and the development of a factual record would not be helpful or necessary to

NEPA and FLPMA enforcement as judicial management of federal programs is wildly off-base. Contrary to its claims, respondents are not asking the federal courts to actually take over BLM's powers and responsibilities to manage federal lands. All NWF seeks in this action is to have BLM conduct a programmatic EIS, devise land use plans, and notify Congress and the states of its intentions before disposing of longstanding federal protections on federal lands. Opp. Br. Pet. 4. In light of the evidence in the record that many of these lands have environmental and recreational value, such a request is hardly unreasonable.

No management of federal programs is called for, nor would it be appropriate. As this Court pointed out in *Kleppe v. Sierra Club*:

> "The only role for a court is to insure that the agency has taken a "hard look" at environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken." (427 U.S. 390, 410, n. 21 (1975)(citing *Natural Resources Defense Council v. Morton* 458 F.2d 827, 838 (US App DC 1972)).

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decide this legal issue." Pet. App. 142a.

No separation of powers principles are violated by the enforcement of NEPA and FLPMA. Congress specifically provided for public participation throughout the NEPA and FLPMA processes. NWF is seeking to enforce these rights. NWF is not seeking any review of statutes, or challenging any laws on Constitutional grounds. It is not seeking a radical reinterpretation of either NEPA or FLPMA. Its challenge of BLM's failure to comply with NEPA and FLPMA falls squarely in line with other state and public challenges to federal agency action on environmental grounds, as recognized by the District Court in originally granting the preliminary injunction, and by the Appeals Court in affirming the grant.

If this Court interprets the enforcement of NEPA and FLPMA as judicial management, states and other interested parties will be seriously hampered in demanding that federal agencies in the future comply with these procedures. Other courts will also regard as judicial management ordering a federal agency to perform an EIS or to draft a land use plan or to notify Congress. Without the ability to seek relief from the courts, EISs and the procedural opportunities they provide to states and the public would soon be a distant memory.

Amici States also note that petitioner's argument that this case would "overwhelm" the judicial capability ignores what would happen if its bizarre and overly restrictive standing doctrine were accepted by this Court. If indeed an environmental group must allege

and prove that an individual member has made specific and demonstrated use of each and every parcel of land affected by petitioner's nationwide program of revoking land withdrawals, the obvious response of environmental groups will be to accept the implied challenge issued by petitioner and file hundreds or even thousands of suits, each virtually identical in the statutory issues raised and the relief sought, but alleging specific harm to specific individuals for each and every parcel of land affected. Given the large number of federal programmatic decisions each year affecting thousands or millions of people, such a scenario would truly overwhelm the courts, not to mention the federal agencies and those defending them, with no advantage in sharpening the issues affecting the validity of the program as a whole or otherwise fulfilling the purposes of the standing doctrines.

Standing doctrines should not be used to exclude from judicial review cases that are not nonjusticiable, but merely hard. The courts are charged by the Constitution with deciding big cases as well as small ones, difficult and challenging cases as well as simple ones. Petitioner's argument on this point should be rejected by the Court.

III

PROCEDURAL INJURY UNDER NEPA OR FLPMA IS NOT THE EQUIVALENT OF INFORMATIONAL INJURY UNDER THE FREEDOM OF INFORMATION ACT ("FOIA")

Petitioner argues that the NWF lacks standing to challenge the paucity of information and opportunity for public participation afforded by BLM in the land withdrawal program, stating that the NWF has not alleged that it ever sought information that petitioner refused to disclose. In that argument, petitioner invokes the standard for disclosure of information in the Freedom of Information Act, 5 U.S.C. § 552 (see petitioner's brief at pages 41-43), and then grafts that standard onto the FLPMA and NEPA issues that are presented in this case. Amici States are extremely disturbed that, some twenty years after the passage of NEPA, a federal agency could so misconstrue its duty under that statute. NEPA was not enacted for the benefit of historians. The standard for what petitioner calls "informational standing" would deprive not only respondents, but States and the general public of the information and the open and public decision-making process in decisions that affect the environment that make up the very heart of NEPA.

The generation and public dissemination of information on the environmental effects of major federal actions are the central purposes of NEPA. The statute is designed to ensure that federal agencies take a "hard look" at the environmental consequences of their actions, informing both themselves as decision-makers and the public as to those consequences. *Andrus v. Sierra Club*, 442 U.S. at 350. Preparation of an Environmental Impact Statement (EIS) ensures that agencies "will have available and will carefully consider detailed information concerning significant environmental impacts." *Robertson v. Methow Valley Citizens Council,* 109 S.Ct. at 1845. Moreover, it also "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisiomaking process and the implementation of that decision." *Id.*

Petitioner claims, however, that so long as it is willing to open up its agency files to the public upon request, members of the public can claim no injury from its decisions. But NEPA and FLPMA are not the natural resources equivalent of the Freedom of Information Act ("FOIA"). Petitioner's analogy to FOIA, which may have been apt in the context of the open meeting law considered in *Public Citizen v. U.S. Department of Justice*, is therefore inapposite. NEPA is specifically intended to be "action-forcing"; it requires agencies to affirmatively analyze all potential environmental consequences of a project, and to present this information to the public, regardless of

whether the public asks for it. This "action-forcing" provision, and the public notice and review provisions of FLPMA, are hardly satisfied by turning over boxes of paper after agency decisions have already been made.

Nor is the provision of information alone sufficient to satisfy NEPA. NEPA requires more than just the disclosure of information; it mandates an open and public decision-making process of which environmental values are part and parcel. *See*, *Robertson* at 1845 : "[T]he requirement that agencies prepared detailed impact statements inevitably bring[s] pressure to bear on agencies 'to respond to the needs of environmental quality' [citations omitted]." The statute's implementing regulations make explicit the obligation of federal agencies to include the public in their decision making process. (*See* 40 C.F.R. § 1506.6 (1989).) As the Court has observed, publication of an EIS, both in draft and final form "provides a springboard for public comment." *Robertson* at 1845. Indeed, since no particular substantive result is required under NEPA (that is, a federal agency need not choose the most environmentally preferable alternative or action), it is this *process*, the generation of information, the full and complete disclosure of that information to the public, and the open decision-making process in which environmental values are required to be considered by the agency, that is the essence of NEPA. This process is what NEPA adds to federal decision-making, and to be deprived of it is to lose all the protection of the

statute that Congress intended to provide. *Commonwealth of Massachusetts, et al. v. Watt*, 716 F.2d 946 (1st Cir.1983).

Petitioner attempts to read out entirely this injury in fact which is caused by agency violations of NEPA: the loss of the opportunity to participate in the federal decision-making process, and the absence of the agency NEPA process in which environmental values are analyzed in detail. The affidavits of respondent clearly state such harm: they establish that individual members of NWF not only use and enjoy lands affected by the petitioner's program, but that these individuals have participated in administrative proceedings involving these lands in the past,[14/] and are likely to enter fully into the open decision-making process that NEPA guarantees. As for NWF itself, Lynn Greenwalt's affidavit demonstrates that the central purposes of the organization include providing its members the very kinds of information that NEPA requires, as well as representing its members in the decision-making process that NEPA provides. *See*, Affidavit of Lynn Greenwalt at paragraph 5.

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14. See affidavit of Richard Loren Erman at paragraphs 4 and 8, affidavit of Peggy Kay Peterson at paragraphs 4 and 8, and affidavit of Lynn A. Greenwalt at paragraphs 3 and 4 for specific allegations of both past participation in federal decision-making processes and interest in participating in the BLM decision at issue here.

The interest of amici States in the information and open procedures NEPA requires is not an academic one. It is States that most often must deal with the environmental consequences of federal action, whether on air quality, water quality, or use of land owned by the federal government. It is the States that must handle instream pollution caused by mine waste runoff, and it is States and their political subdivisions that must plan for roads to access newly opened and developing federal lands, for influxes of workers or new industry that will respond to changing land use, and for all the other consequences of the decisions that will flow from the cancellation of land withdrawals. Since States must accept these burdens, they must have access to full information on what they may expect to happen, and they must have access to the process of decision-making so that they may protect their citizens and their resources as much as possible. NEPA provides these rights, and amici States ask the Court to reaffirm them.[15/]

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15. As the Court recently observed: "With respect to a development. . .where the adverse effects. . .are primarily attributable to predicted off-site development that will be subject to regulation by other governmental bodies, the EIS serves the function of offering those bodies adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner." *Robertson* at 1846.

To equate standing under FOIA with NEPA standing is a gross distortion of NEPA's purposes and to the long-standing and settled law under NEPA. The NEPA claims in respondent's suit have been ignored by petitioner. Amici States are concerned that this Court give to these claims the attention that they deserve, and that the Court continue its long tradition of protecting the NEPA rights of the general public and of the States.

CONCLUSION

For the reasons stated above, the petition should be denied, and the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General
of the State of California
ANDREA SHERIDAN ORDIN
Chief Assistant Attorney General
*THEODORA P. BERGER
Assistant Attorney General
CRAIG C. THOMPSON
SUSAN L. DURBIN
CLIFFORD L. RECHTSCHAFFEN
NILDA M. MESA

April 2, 1990

*Counsel of Record

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On April 2, 1990, I served the within Brief of Amici Curiae in re: "Manuel Lujan, Jr. vs. National Wildlife Federation" in the United States Supreme Court, October Term, 1989, No. 89-640, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

John G. Roberts, Jr.
Acting Solicitor General
Richard B. Stewart
Assistant Attorney General
Lawrence S. Robbins
Assistant to the
Solicitor General
Peter R. Steenland, Jr.
Anne S. Almy
Fred R. Disheroon
David A. Kubichek
Vicki L. Plaut
Attorneys
U.S. Department of Justice
Washington, D.C. 20530

Kathleen C. Zimmerman
Norman L. Dean, Jr.
National Wildlife Federation
1400 16th Street, N.W.
Washington, D.C. 20036

William Perry Pendley
Mountain States Legal
Foundation
1660 Lincoln Street
Denver, CO 80264

Terrence P. Ross
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

James Burling
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, CA 95833

Constance E. Brooks
Lindsay, Hart, Neil & Weigler
222 S.W. Columbia, Suite 1800
Portland, OR 97201

John J. Rademacher
General Counsel
American Farm Bureau
Federation
225 Touhy Avenue
Park Ridge, IL 60068

Bruce J. Ennis
David W. Ogden
David A. Handzo
Jenner & Block
21 Dupont Circle, N.W.
Washington, D.C. 20036

Jerry L. Haggard
Gerrie Apker Kurtz
Apker, Apker, Haggard &
Curtz, P.C.
2111 East Highland Avenue,
Suite 230
Phoenix, AZ 85016

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 2, 1990, at Los Angeles, California.

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